

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

BARONS BUS, INC.

and

Cases: 09-CA-266622  
09-CA-269462

EASTERN STATES JOINT BOARD,  
LOCAL 322, AFL-CIO

*Erik Brinker, Esq.,*  
for the General Counsel.  
*Katherine Ferguson and Matthew D. Austin, Esqs.,*  
for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserts that in September 2020, Barons Bus, Inc. (Respondent) violated the National Labor Relations Act (the Act) by unlawfully refusing to hire three shuttle bus drivers of its predecessor, and by refusing to recognize and bargain with the Eastern States Joint Board, Local 322, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the bargaining unit despite being a successor employer. For the reasons explained below, I have determined that Respondent violated the Act when it refused to hire the three shuttle bus drivers and refused to recognize and bargain with the Union.

STATEMENT OF THE CASE

This case was tried by videoconference on March 24–26, 2021.<sup>1</sup> The Union filed the charge in Case 09-CA-266622 on September 23, 2020, and filed the charge in Case 09-CA-269462 on November 23, 2020.<sup>2</sup> The Union filed an amended charge in Case 09-CA-266622 on December 14, 2020. On February 9, 2021, the General Counsel issued a consolidated complaint in which it alleged that Respondent violated Section 8(a)(3), (4) and (1) of the Act by, on about September 1, 2020, refusing to hire Marsha Brandenburg, Angela Hubbard and Denise Tucker because they engaged in union and protected concerted activities and because Tucker threatened to file a charge with the National Labor Relations Board. The General Counsel also alleged that Respondent violated Section 8(a)(5) and (1) of the Act by, since about September 3, 2020, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

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<sup>1</sup> None of the parties objected to conducting the trial by videoconference. (Tr. 7.)

<sup>2</sup> All dates are in 2020, unless otherwise indicated.

On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT<sup>4</sup>

### I. JURISDICTION

Respondent, a corporation with a place of business in Middletown, Ohio, has been engaged in the business of providing interstate and intrastate transportation services to passengers, including passengers at a facility/property owned and operated by AK Steel Corporation in Middletown, Ohio. Based on a projection of its operations since about September 1, 2020, Respondent annually provides services valued in excess of \$50,000 to AK Steel Corporation. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Board has jurisdiction over Respondent. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

##### 1. Union representation

On March 4, 2015, the Board certified the Union as the exclusive collective-bargaining representative of the following appropriate bargaining unit at Lakefront Lines, Inc.:

All full-time, regular part-time, and casual drivers, and all full-time and regular part-time operators, mechanics and cleaners employed by the Employer at its facility located at 4991 Factory Drive, Fairfield Ohio 45014; excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act.

(GC Exh. 2.) Thereafter, the Union and Lakefront Lines executed a series of collective-bargaining agreements, the most recent of which was effective from November 1, 2018 through October 31, 2021. (GC Exh. 3; Tr. 11, 33–34, 60–61, 404.)

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<sup>3</sup> The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: p. 7, l. 8: “through” should be “or”; p. 11, l. 7: “until” should be “under”; p. 40, l. 20–21: “and using” should be “inducing”; p. 53, l. 9: “alludes” should be “eludes”; p. 94, l. 21: “jobs” should be “jogs”; p. 484, l. 3: “pit” should be “bit”; p. 503, l. 4: “want” should be “went”; p. 533, l. 12: “shows” should be “shoes”; p. 653, ll. 6, 12, 14: “ginny” should be [derogatory term G-----]; and p. 667, l. 17: “Vote” should be “Vogt”. I also note that the following exhibits appear in the exhibit file but are not part of the evidentiary record since they were either withdrawn or never offered into evidence: GC Exhs. 7, 10; R. Exh. 22.

<sup>4</sup> Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

Although the bargaining unit includes a variety of drivers, including mega bus drivers who drive routes between cities around the country and charter bus drivers, this case relates to a group of 10–12 drivers who operate shuttle buses at the AK Steel facility. The parties have stipulated that the Union was the collective-bargaining representative of Respondent’s employees from September 2020, when Respondent took over Lakefront Lines’ contract with AK Steel, until the date Respondent ceased performing work under the AK Steel contract. (Tr. 10–11, 36, 607; see also Findings of Fact (FOF), Section II(M), *infra*) (noting that Respondent terminated its contract with AK Steel on about February 28, 2021).)

James (Jim) Vogt is the Union’s secretary-treasurer and business agent and has been in that position since around 2015 or 2016. Danny Alvarez also served as business agent (reporting to Vogt) and was assigned to service the AK Steel shuttle drivers, but witnesses indicated that Alvarez missed the few meetings that he scheduled with shuttle bus drivers and was not responsive when shuttle drivers attempted to contact him. Alvarez left his position with the Union in about December 2019, after which time Vogt became the primary contact for the shuttle drivers in the bargaining unit. (Tr. 31–32, 50–51, 70–71, 73, 89, 114–115, 179–181, 187, 359, 404–405, 471–473, 479, 497–499, 511–512, 571–572, 578–580, 605–606.)

## 2. Management of shuttle bus drivers at the AK Steel facility

Beginning in 2019, Gary Robeson worked for Lakefront Lines as general manager of Lakefront Lines’ operations in Cincinnati and Toledo, Ohio. Robeson was also general manager for Lakefront Lines’ shuttle bus service at AK Steel (as part of his Cincinnati assignment), but only visited the AK Steel facility approximately three times during the year he served as general manager. (Tr. 41–42, 51–52, 239, 387–388, 569–570.)

Phyllis McGlothen, meanwhile, was the lead driver at the AK Steel facility, but was also a member of the bargaining unit.<sup>5</sup> As lead driver, a position she began in 2017 or 2018, McGlothen: made the weekly schedule to assign the shifts, routes and buses<sup>6</sup> to full-time and part-time drivers; reviewed and approved requests for time off; kept track of the payroll; issued discipline for attendance and other infractions; and made sure the shuttle buses were clean, fueled and maintained. Shuttle bus drivers occasionally reached out to Robeson for assistance if they could not resolve a workplace issue with McGlothen. The Union, meanwhile, was not fully aware of the duties McGlothen handled as lead driver, and thus McGlothen remained a member of the bargaining unit.<sup>7</sup> (Tr. 51–54, 72, 201, 222, 235, 237–240, 274–275, 349–355, 392–393,

<sup>5</sup> As a bargaining unit member, McGlothen assisted Vogt in 2018 with negotiating the collective-bargaining agreement with Lakefront Lines (in effect from November 1, 2018 through October 31, 2021), and also assisted with negotiating the initial collective-bargaining agreement. Vogt considered McGlothen to be the union steward for the AK Steel shuttle bus drivers, but McGlothen disputes that she held that role. (Tr. 55, 68–69, 72, 357, 360, 404; see also GC Exh. 3.)

<sup>6</sup> At Robeson’s direction, McGlothen rotated the buses assigned to each route, and the shuttle bus drivers used the bus that was assigned to their route. Shuttle bus drivers did have the option of exchanging the bus assigned to their route with one of the two spare buses (if available) parked behind the shuttle bus facility. (Tr. 155–156, 274–275, 350, 407–408, 452, 590–591.)

<sup>7</sup> After a scheduling dispute, Vogt did ask Robeson why McGlothen was giving out hours and schedules. Robeson promised to look into the issue and later advised Vogt that the issue had been taken care of. (Tr. 49–50, 53–54.)

402–404, 435, 438, 445, 452, 497, 546–547, 570–571, 574, 608; GC Exh. 8 (examples of disciplinary warnings that McGlothen issued in 2019, and 2021).)

In November 2019, Respondent selected Stephanie Doucette for the position of assistant lead driver. In that role, Doucette generally checked the shuttle buses to determine if any repairs were needed and ensured that the shuttle buses had sufficient fuel. Doucette would act as lead driver if McGlothen was not present but did not do any scheduling or route assignments. (Tr. 469–470, 574–575, 603–604, 615–616.)

### 3. Shuttle bus service at the AK Steel facility

The shuttle bus drivers at the AK Steel facility are tasked with driving bus routes that take AK Steel workers to and from various locations on the property. The drivers generally work in 4-hour shifts (morning, afternoon and evening), with full-time drivers typically working two shifts and part-time drivers working one shift. Notably, all drivers receive 4 hours of pay per shift regardless of how long it takes them to complete their routes. Since the routes are not exceptionally long, it would not be uncommon for a driver (for example) to finish his or her routes in 2 hours (or less) but still be paid for a full 4-hour shift. (Tr. 136–138, 183, 456, 560–561.)

In summer 2020, Lakefront Lines was running five routes: Green 1; Green 2; Yellow 1; Yellow 2; and Yellow 3.<sup>8</sup> McGlothen assigned shifts and routes to full time drivers in order of seniority and based on driver preference, and then assigned any remaining shifts in the week to part-time drivers. Part-time drivers most commonly worked the evening shifts since many of the part-time drivers had other jobs in the daytime. The shuttle bus routes were not all identical – the Green routes were shorter than the Yellow routes, and Yellow 2 only required two laps while Yellow 1 and Yellow 3 required three laps. Regardless, as noted above, drivers could finish any of the routes in around 2 hours (or less). (Tr. 147–154, 370–373, 409–411, 442, 456, 536, 547–548, 560–563, 566–567, 608; GC Exh. 6; R. Exh. 3 (pp. 2–6).)

### *B. Lakefront Lines Policies and Practices*

#### 1. Scheduling and seniority

As lead driver, McGlothen made the weekly work schedule and approved (or disapproved) requests for time off that employees would post on a bulletin board at the facility. McGlothen also contacted drivers to cover open shifts on the schedule (e.g., due to a driver being late or otherwise unavailable), though a driver with a scheduling conflict could first attempt to swap shifts with another driver to maintain their hours. The rules of seniority determine which drivers have priority regarding time off requests or opportunities to cover open shifts, though McGlothen found that her options were more limited on weekdays during the school year because the part-time drivers (many of whom also drove school buses) were not available to

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<sup>8</sup> The Yellow routes travel in a circle from Lefferson Gate to the “big old furnace” (BOF), the Caster, and then back to the Lefferson Gate. The Green routes, meanwhile, travel from the Lefferson Gate to either the blast furnace or the Caster (sometimes with an intermediate stop) and then back to the Lefferson Gate. (Tr. 148, 481; R. Exh. 3 (pp. 2–6).)

cover open shifts in the morning or afternoon. (Tr. 84–85, 121, 131, 184–186, 235, 411, 442–443, 546–547, 599; see also Tr. 373 (noting that McGlothen posted the 2-week schedule on the Friday before the first Monday on the schedule).)

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## 2. Attendance

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As a practice, McGlothen required all shuttle bus drivers to arrive 30 minutes before the start of their route. To clock-in for their shift, drivers needed to visit an AK Steel security checkpoint in the parking lot and scan their identification badge, and then proceed to the shuttle bus facility to sign a sheet to show payroll the shift(s) they worked each day. If a driver did not arrive for their shift at the designated time and had not otherwise called about being late, McGlothen or the assistant lead driver would call the driver to determine their status. If the driver did not answer the call, then McGlothen would contact another driver to come in and cover the route. McGlothen issued written warnings to drivers who came in late (less than 30 minutes before the start time of their route) but in time to drive their routes, and also issued written warnings to drivers who missed their shifts. (Tr. 166, 256–257, 408–409, 457–458, 460, 500–502, 609–610; GC Exh. 8 (pp. 1–2, 5); R. Exh. 21 (examples of clock-in and clock-out times that Respondent may obtain from AK Steel upon request).)

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## 3. Discipline

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Under the progressive discipline policy set forth in the collective-bargaining agreement, disciplinary action at Lakefront Lines proceeds as follows: first offense – verbal warning (recorded in writing); second offense – written warning; third offense – suspension of 1 day; fourth offense – suspension of up to 5 days; and fifth offense – termination. Lakefront Lines retained the right to compress or extend the disciplinary process based upon the circumstances, subject to challenge by the Union. Warning letters must be sent to the Union (with copies also going to the employee and shop steward) and must state the specific reasons for the warning. Employees then have the right to appeal through the grievance procedure. (GC Exh. 3 (Art. 2, Sec. F–G).)

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In practice, McGlothen issued disciplinary warnings to the shuttle bus drivers (sometimes with Doucette present in her capacity as union steward). Lakefront Lines, however, did not consistently send the Union copies of the disciplinary warnings that McGlothen issued (and to the extent that that Lakefront Lines did send copies, it sent them to Alvarez, who was not always responsive). If the Vogt did learn of an issue from an employee concerned about a workplace matter (after Vogt became the bargaining unit’s primary point of contact), he communicated directly with Robeson to explore finding a solution. (Tr. 50–51, 78, 168, 350–353, 360, 393, 472–473, 601–602, 615, 620–621; GC Exh. 8.)<sup>9</sup>

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<sup>9</sup> McGlothen testified that, at some point, she stopped issuing disciplinary warnings because nothing ever came of them. (Tr. 368, 370, 420, 444.) I do not credit that testimony because it is not sufficiently reliable. First, by all accounts, McGlothen was strict with the drivers and ran a “tight ship.” (Tr. 224, 489, 512–513, 574, 619–620.) Given that management style, it does not stand to reason that McGlothen would stop disciplining employees for infractions. Second, Doucette noted that McGlothen was unable to find some of the disciplinary warnings that she (McGlothen) issued. (Tr. 492.) That testimony (provided by one of Respondent’s witnesses) explains why the parties did not present any written disciplinary warnings that McGlothen may have issued between September 2019 and January 2021. (See GC Exh. 8

*C. Employees Marsha Brandenburg, Angela Hubbard and Denise Tucker – Background*

1. Marsha Brandenburg

Marsha Brandenburg began working for Lakefront Lines in February 2019 as a part-time shuttle bus driver. Although Brandenburg also worked as a school bus driver for a nearby school district, she typically was scheduled for 34–44 hours per week for Lakefront Lines and viewed the Lakefront Lines shuttle bus driver position as her primary job. (Tr. 106–107; see also GC Exh. 6 (showing Brandenburg scheduled for 72 hours from July 20–August 2, 2020, and 68 hours from August 3–16, 2020); FOF, Section II(A)(3), *supra* (noting that while employees are scheduled and paid for 4-hour shifts, they generally can complete each shift in 2 hours or less).)

In July and August 2019, Brandenburg received three disciplinary notices related to attendance.<sup>10</sup> Specifically, on July 5, Brandenburg received a written verbal warning for missing her morning shift because her alarm clock did not go off (causing McGlothen to work the shift in Brandenburg’s absence). On August 5, Brandenburg received a written warning for clocking in at 1:20 pm when she was expected to arrive at work by 1:00 pm. And on August 30, Brandenburg received a “written insubordinate” for clocking in at 10:00 pm when she was expected to arrive at work by 9:45 pm, and then driving her route at 10:10 pm even though McGlothen instructed Brandenburg to go home because she (McGlothen) had asked another driver to work the shift in Brandenburg’s absence. (Tr. 189–191, 195–197, 253–254, 264, 350–353, 421–422, 447–449, 458–459, 577; R. Exh. 8.) There is no evidence that Lakefront Lines took any further disciplinary action against Brandenburg for attendance or any other infractions.<sup>11</sup>

At some point in the summer or early fall of 2019, Brandenburg and Doucette ran against each other for the position of union steward. Doucette, who was relatively new to the shuttle bus

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(showing disciplinary warnings that McGlothen issued in July/August 2019 and February 2021).)

<sup>10</sup> Although some witnesses testified that Brandenburg had problems with attendance throughout her employment with Lakefront Lines, I give limited weight to that testimony because there is no evidence that Respondent took disciplinary action against Brandenburg for those issues, and because Respondent did not present any clock-in records from AK Steel to demonstrate that Brandenburg’s attendance was an ongoing problem. (See Tr. 423, 481, 500–501, 530–531, 545–546; compare R. Exh. 21 (clock-in records that Respondent obtained from AK Steel for August 31 and September 1–2, 2020).)

<sup>11</sup> At some point in 2019, McGlothen called Robeson to report that Brandenburg was wearing jeans with holes in them, which was not consistent with AK Steel’s requirement that personnel wear long pants. Robeson called Brandenburg to advise that Brandenburg could not wear the jeans while at work. Robeson subsequently wrote and posted a dress code for shuttle bus drivers. There is no evidence that Lakefront Lines took any disciplinary action against Brandenburg for this incident or for her attire on any other occasion. (Tr. 191, 424–425, 559, 583–584, 606–607; see also Tr. 533 (explaining that Lakefront Lines expected shuttle bus drivers to wear long pants, shirts that at least came down to the elbow, and dark colored shoes).)

In terms of other alleged infractions, I note that I have given no weight to McGlothen’s testimony that she was aware that Brandenburg told other drivers she (Brandenburg) was selling pain pills. (See Tr. 425.) McGlothen offered no testimony about who made that claim, when she heard about the issue, or any action she took to address it. Thus, McGlothen’s testimony on this point was far too vague to be credited, even for the limited purpose of establishing McGlothen’s state of mind concerning Brandenburg.

driver position, ran for the union steward position at the suggestion of either McGlothen or McGlothen's daughter, Tamara (Tammy) Morgerson. When Doucette expressed concern about becoming union steward because of the cost of driving to and from union meetings, McGlothen promised to ask Robeson about compensating Doucette for her time or providing a prepaid gas card. McGlothen also encouraged Tucker and other selected drivers to vote for Doucette because McGlothen did not want Brandenburg in the union steward role.<sup>12</sup> The bargaining unit elected Doucette to serve as union steward. (Tr. 73, 107, 112, 181, 251–253, 263, 358, 406, 470–471, 475, 496–497.)

After Doucette began serving as union steward, Brandenburg voiced complaints to Doucette about the schedule and the hours that McGlothen was assigning. Doucette approached Robeson about some of these complaints and formed the impression that Robeson took care of whatever Brandenburg wanted. Eventually, by late fall 2019, Doucette and Brandenburg had a falling out and stopped talking to each other, in part because Brandenburg believed that Doucette was aligning herself with McGlothen.<sup>13</sup> (Tr. 191–192, 474–476, 483, 499, 515–516.)

By fall 2019, Brandenburg and McGlothen had an ongoing dispute about scheduling. Among other concerns, Brandenburg maintained that McGlothen: (a) was assigning Brandenburg too many hours given that Brandenburg was a part-time employee and also worked full-time for the school district during the school year; and (b) was not following seniority when calling in drivers to cover an open shift (which was of particular interest to Brandenburg in the summer when she was not also driving for the school district). Since Brandenburg was unable to resolve her concerns directly with McGlothen and was not on good terms with Doucette, Brandenburg began communicating directly with Robeson about McGlothen's scheduling practices. For example, in November 2019, Brandenburg emailed Robeson to complain about being scheduled to work an evening shift on Thanksgiving (November 28, 2019) and three shifts each on the subsequent Friday, Saturday and Sunday (November 29–December 1, 2019). Robeson replied that Lakefront Lines needed Brandenburg to work her assigned shifts (in part because the company was short-staffed),<sup>14</sup> and asserted that there was “no satisfying” Brandenburg because she was the “first one to call and complain that someone else is working

<sup>12</sup> McGlothen denied telling employees her preference for who should be union steward (see Tr. 358–359), but I do not credit that testimony. The evidentiary record, including testimony from Doucette, shows that McGlothen encouraged and/or facilitated Doucette's candidacy for the union steward position. Accordingly, I credit Tucker's testimony (see Tr. 251–253) that McGlothen encouraged employees to vote for Doucette (and keep Brandenburg out), because Tucker's testimony is fully consistent with McGlothen's other conduct to support Doucette's election.

<sup>13</sup> According to Doucette, on one day in 2019, Brandenburg commented: (a) that she had purchased a gun and if things weren't taken care of the way that she wanted she could take care of it herself; and (b) that she and her husband could eliminate someone with no trace if needed. Doucette interpreted these remarks as a threat and began having coworkers walk her to her car at night for a period of time, and also advised McGlothen and Alvarez of Brandenburg's remarks. (Tr. 424, 473–474, 482–483, 506, 532–533; see also Tr. 483 (noting that Morgerson, who passed away in 2019, was the first employee who began walk Doucette to her car).) There is no evidence that Lakefront Lines investigated this issue or took any disciplinary action against Brandenburg for the comments that Doucette described.

<sup>14</sup> Morgerson passed away shortly before this exchange, which is partly why the shuttle bus drivers were short staffed, and also partly why Brandenburg was reluctant to complain directly to McGlothen about the schedule. (See Tr. 139, 269–270; GC Exh. 5(e).)

more hours” than she was. Brandenburg responded by emailing (among other things): “Yes I complain when I go from 80 hrs to 48. It doesn’t matter apparently it doesn’t do any good to say anything anyway, if it’s about hours, seniority, no heat in the buses, how dare me.” Ultimately, Robeson and Brandenburg resolved this dispute, in part with Robeson promising to give  
 5 Brandenburg some time off in the future. (Tr. 138–142, 184–189, 193–194, 394–395, 581–582, 584–585, 604; GC Exh. 5(e); see also Tr. 261, 319, 531–532, 584 (noting that Brandenburg and McGlothen generally did not get along).)

## 2. Angela Hubbard

10 Angela (Angie) Hubbard began working for Lakefront Lines in about August 2019, as a part-time shuttle bus driver at the AK Steel facility. Like Brandenburg, Hubbard also worked full-time as a bus driver for a nearby school district. (Tr. 273, 504–505.)

15 In her time as a shuttle bus driver, Hubbard did not accrue any disciplinary warnings. Hubbard also had a good track record for attendance, as she generally arrived on time and, on the rare occasion that she was running late, called in to advise McGlothen of her status. Hubbard did have occasional disagreements with coworkers about who would drive which shuttle bus (with  
 20 each side asserting that the other switched buses around to avoid driving a bus in poor condition), but there is no evidence that management needed to take any action (beyond repairing buses as needed and rotating buses so they were used on different routes) to resolve these disagreements.<sup>15</sup> (Tr. 275–279, 301, 308–310, 426, 443–444, 484, 492–494, 506, 535–536, 553, 600–601.)

## 3. Denise Tucker

25 In 2018, Denise (Dennie) Tucker began working for Lakefront Lines as a full-time shuttle bus driver at the AK Steel facility. Tucker had some trouble getting up in the morning, which Morgerson, and later McGlothen, addressed by calling Tucker each morning to make sure she  
 30 got out of bed in time to get ready for her shift. In addition, Tucker occasionally made sexually inappropriate comments to her coworkers for shock value while at work, such as telling a coworker (when McGlothen was also present) that the coworker had a pretty face and that Tucker “had something she could put that tongue on.”<sup>16</sup> There is no evidence, however, that

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<sup>15</sup> All of the shuttle buses sustain a fair amount of wear and tear, as the buses travel on rough dirt roads around the AK Steel facility. (Tr. 281, 408, 442, 514–515.)

<sup>16</sup> Tucker denied making vulgar or sexually inappropriate comments at work but admitted to jokingly making sexual gestures to Doucette’s husband when they saw each other socially outside of the workplace (there is no evidence that McGlothen was aware of any of this non-workplace conduct). (See Tr. 258–259; see also Tr. 486–488 (Doucette’s description of inappropriate comments/gestures that Tucker made outside of the workplace or in settings that were not specified).) Given Tucker’s admission about her conduct outside of the workplace and the testimony from multiple other witnesses, I do not credit Tucker’s testimony that she never made sexually inappropriate comments while at work. (See Tr. 329–330, 485–486, 538–539.) To be sure, there is also evidence that other shuttle bus drivers, as well as AK Steel employees, made sexually inappropriate comments while at the facility. (See Tr. 329, 333–334 (two shuttle bus drivers discussing porn stars), 369, 485, 539 (AK Steel employees using vulgar language).) The evidentiary record does not show how Lakefront Lines or AK Steel addressed that conduct to the extent that it was aware of it.



Lakefront Lines took any disciplinary action to address Tucker's attendance or any of Tucker's remarks in the workplace; to the contrary, Tucker did not receive any disciplinary warnings during her time as a shuttle bus driver. (Tr. 234, 245–246, 260–261, 329–330, 368–370, 426–428, 444, 459, 485–486, 537–539.)

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*D. January–July 2020: Increasing Discord Among Shuttle Bus Drivers*

1. January 2020 – Vogt contacts Robeson about hours assigned to drivers

10 On January 2, 2020, Vogt, who was now serving as the Union's main point of contact for the bargaining unit, emailed Robeson about employee hours and overtime. The following email exchange occurred:

15 Vogt: Got some calls from drivers at AK Steel that some drivers are out and OT is being given to the same people and not spreading it out

20 Robeson: No one has approached me about this. A few weeks ago they were complaining about working too many hours because Phyllis was off for surgery. I have hired 3 new drivers for there and they are now trained and ready to work. Tell who ever is complaining to call me.

25 (GC Exh. 14 (p. 5); see also Tr. 607.) Consistent with Robeson's suggestion, Vogt encouraged Brandenburg to contact Robeson about any issues that arose related to time off and scheduling. (Tr. 96–98.)

2. March 2020 – Brandenburg contacts Robeson about scheduling and seniority

30 On March 4–5, 2020, Brandenburg emailed Robeson to object to the prospect of having her hours reduced. In one of her emails, Brandenburg commented as follows:

35 You know Gary, Phyllis and Tammy tried screwing me over ever[y] chance they got. Now Phyllis is alone in trying to get to me especially since I'm on the same route all the time. This job is supposed to go by seniority, but it doesn't. You hired Stephanie over me [for assistant lead driver], which the only thing she does is collect \$1.00 more on the hour and way more hours. I'm not mad at her tho. I just don't know why you agree with everything Phyllis says and why I'm always coming out on the short end! . . .

40 (GC Exh. 5(f); see also Tr. 118–120, 178–179.) Robeson telephoned Brandenburg to discuss the issues raised in her emails. (Tr. 395–396, 582–583.)

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I would be remiss if I did not point out that the type of conduct described here could raise questions about whether an employer is liable for harassment in violation of Title VII of the Civil Rights Act of 1964, depending, of course on the specific facts at issue. See <https://www.eeoc.gov/harassment>. I do not express any views on the merits of any such issue in this case; rather the information that I have provided here about Title VII is for reference only.

### 3. June 2020 – Brandenburg objects to handling of vacation requests

In mid-June, Brandenburg took issue with how McGlothen was handling requests for vacation time. Brandenburg sent the following email to Robeson on June 14:

Phyllis is out of town for the next 10 days so I wanted to let you know that I put in for [M]emorial [D]ay weekend and didn't get it. . . . I also put in for July 4<sup>th</sup> weekend and Phyllis told Stephanie to write not approved on it. I will be in lake Cumberland that weekend and as a part time person our contract says we can take off whenever we want. And I also know I have to give at least a 10 day notice without losing any hours. Which I did. She has known about this for quite a while! Don't know what her problem is with me but I am tired of being harassed at work!! She needs to stop and I will be off and she already has the schedule made out at her house. Why can everyone take time off but me!? Also I should not lose any hours. There are plenty of people here that would work. I expect the same hours as everyone else. I'm sure this sounds like I'm being mean but really not trying to be. But I do know our contract. Please have Stephanie fix it. Thank you.

(GC Exhs. 5(a); see also GC Exh. 13 (copy of Brandenburg's note requesting time off for July 3–5, and showing a “not approved” notation); Tr. 120–123, 381–382.) Brandenburg also notified Vogt of the issue, and eventually was approved to take one of the July 4 weekend days as a day off. (Tr. 116, 123.)<sup>17</sup>

When McGlothen learned that Brandenburg would be getting time off during the July 4 weekend, McGlothen told Brandenburg that she was sick and tired of Brandenburg going to the union and getting her way. Brandenburg responded that she “pay[s] \$1200 a year for the union and [is] going to use it.” (Tr. 123–124; see also Tr. 287–288, 303 (noting that at some point after this incident, if another employee asked for time off, McGlothen would remark “I have to by seniority, girls, or Marsha's going to call the union”).)

### 4. June 2020 – Lakefront Lines reimburses Brandenburg for not being given an opportunity to cover an open shift in order of seniority

On June 21, Brandenburg emailed Robeson to complain about how McGlothen filled an open shift. Brandenburg stated as follows:

So here we go. I have not missed 1 day this last pay period. I had a total of 64 hours. Stephanie ask[ed] Michelle to work for her on the 18<sup>th</sup>. Plus [Employee 1] is off for 2 weeks and who does Phyllis ask [first]? Debbie and Michelle. I wasn't working. I have more seniority. Why didn't she call me? That's \$144.00 I lost out on! Gary why won't you hear me when I tell you how vindictive Phyllis is with me. If someone doesn't do what she wants [you're] gonna get punished and she's mad because I'm off on the weekend of July 4<sup>th</sup>. And you know what, why don't you go back and look and see just

<sup>17</sup> On July 14, Brandenburg raised a similar concern about not knowing whether McGlothen would grant a request for time off on July 26–27. The issue ended up being moot, however, because it turned out that Brandenburg did not need those days off. (See GC Exh. 5(c); Tr. 130–132.)

how many weekends I've had off this year. Not very many! Anyway, Debbie and Michelle both got 72 hours and I got 64. I can't wait to hear why. You know this is harassment don't you? The bad part of it [is] that Phyllis and Stephanie get in there running [their] mouths and putting my business out there as to why I'm upset [then] everyone takes it personally. I'm not mad at Debbie or Michelle, I just want what is fair. Please call me tomorrow and let me know what you're going to do about this. Thank you.

(GC Exh. 5(b); see also Tr. 90, 124–127, 183–186, 188 (noting that Brandenburg also confronted Doucette and notified Vogt about this issue); GC Exh. 14 (Vogt email to Robeson, dated June 22, requesting information about the hours each shuttle bus driver has worked and each driver's hire date, because Vogt had received calls concerning hours given to drivers).)

On June 26, Robeson instructed Lakefront Lines payroll that “[s]ince there was an issue with calling in drivers out of seniority order,” the payroll office should “add 8 hours to Marsha’s pay.” (GC Exh. 14 (p. 7); see also Tr. 580–581, 585–587 (explaining that Brandenburg received 4 hours of backpay for the shift that was filled without following seniority, and an additional 4 hours to correct an error on an earlier paycheck); GC Exh. 14 (p. 1) (August 6 email in which Robeson confirmed to Vogt that Brandenburg received 4 hours of backpay for the seniority issue and another 4 hours for a payroll error).)<sup>18</sup>

#### 5. Late June/Early July – Tucker speaks to McGlothen about COVID–19 concerns, and speaks to Robeson about scheduling/hours

In about late June or early July, Employee 1 was scheduled to be on time off for two weeks. When Employee 1 did not return to work after the 2-week period, Tucker called Employee 1’s home and learned from a relative that Employee 1 was in the hospital due to COVID–19 and related complications. (Tr. 240–241.)

Next, Tucker asked McGlothen why no one advised the shuttle bus drivers of Employee 1’s COVID–19 diagnosis so the drivers could decide whether to get tested for COVID–19. McGlothen asserted that such a disclosure would have violated health privacy laws, which prompted Tucker to respond that McGlothen could have provided a more general notice to the drivers about the potential COVID–19 exposure. McGlothen objected to Tucker’s questions about Employee 1 and questioned Tucker about how she (Tucker) found out about the issue. (Tr. 241–242.)

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<sup>18</sup> Brandenburg testified that a few days or weeks later, McGlothen handed Brandenburg a check that included backpay for the shift that was filled outside of seniority order and asked Brandenburg why she always felt the need to go to the Union over every little thing. McGlothen testified that she did not remember such an exchange. (Compare Tr. 127–129 with Tr. 438.) I have not credited Brandenburg’s testimony on this point because, at most, she and McGlothen were equally credible on this point and the General Counsel bears the burden of proof. In addition, the General Counsel did not present any documentation to show that Brandenburg was paid by a separate check for the missing 8 hours, as opposed to being paid electronically by having the 8 hours added to her regular pay (as described in GC Exh. 14 (pp. 1, 7)).

In around the same time period, Tucker joined Doucette in speaking to Robeson about workplace problems related to scheduling/hours. (Tr. 239–240.) The evidentiary record does not show what, if anything, resulted from this discussion.

5           6. July 15 – McGlothen tells Brandenburg she is not running her bus route correctly

On July 15, McGlothen sent a text message to Brandenburg to assert (based on a report that she received from someone at the facility) that Brandenburg was not running her shuttle route correctly. McGlothen and Brandenburg exchanged the following text messages:

10

McGlothen:           Marsha, you have to do your run the way it is set up you do not take shortcuts. If you cannot do your run like it is supposed to be run, or you need to find a different job.

15

Brandenburg:       I answer to Gary period. Per [] Jim Vogt[.] You don't text back when I need you, so you and your lying snitches better quit harassing me or you may need to find a new job!

20

(R. Exh. 7; Tr. 417–418 (McGlothen asserting that there was an ongoing issue with Brandenburg not running her route correctly); see also Tr. 132, 134–138.) Brandenburg subsequently emailed Robeson about the issue, stating as follows:

25

So [McGlothen] sent me a text telling me I wasn't doing my job correctly. Jim Vogt told me to deal with you only since she doesn't text me back when I need her to. I do my job! I clocked out at 3:14. She told me to go find another job if I couldn't do mine. She best quit harassing me. I'm serious Gary. Stephanie hiding my clipboard, Phyllis grasping for any tiny thing on me, she needs to stop it. [They're] playing high school games and I've not spoke to her or Stephanie. I'm not mean to them either but if she can't text me back when I have a problem then don't text me with her lies!

30

(GC Exh. 5(d); see also Tr. 132–134, 136.) There is no evidence that Lakefront Lines took disciplinary action against Brandenburg for not running her route correctly at this time or any other time. (Tr. 134, 420.)

35

7. July 29 – McGlothen tells Hubbard she failed to pick up an AK Steel employee

On July 29, Hubbard texted Vogt and Robeson about a dispute she had with McGlothen about missing a passenger on her (Hubbard's) route. Hubbard stated as follows in her text message:

40

Good Morning Jim and Gary this is Angie Hubbard from AK/Lakefront. I'm texting you because I'm perplexed. Monday I was accused of leaving a passenger at the Caster by Phyllis[.] I know this isn't true.

45

Past practice on the Yellow 1 route is on the 3<sup>rd</sup> round we are to pull in, look, and then continue. If you look at my clocking out the times will be consistent. I asked Phyllis to

give me the name of the person that I supposedly left, of course she couldn't. Gary you can ask Ginger and Marsha about how the yellow 1 works.

I am going to conclude in saying, "Yes I feel targeted." It is a horrible feeling to be around this kind of meanness. Since I was hired last September I haven't been late or missed a day of work, Thank God for good health. I come to work thankful for a great job. I did tell Phyllis I didn't believe her and reminded her of past practice.

I'm just letting you Gentlemen know what is happening. I have to defend myself. I won't be targeted or bullied. Thank you have a blessed day.

(GC Exh. 16; Tr. 315–317, 336–337, 418–419, 601, 667–668, 670–671.) Lakefront Lines did not take any disciplinary action against Hubbard based on this (or any similar) incident.<sup>19</sup> (Tr. 316–317, 420, 669–670.)

*E. July–August 2020: Lakefront Lines Prepares to Go Out of Business and Respondent Bids for and is Awarded the AK Steel Shuttle Bus Contract*

As the COVID–19 pandemic continued, Lakefront Lines reached the point where it decided to go out of business. Since AK Steel was still operating, on July 20, AK Steel contacted Tom Goebel (Respondent's president) about submitting a bid to operate the shuttle buses at the AK Steel facility. Goebel agreed and Respondent submitted a bid on July 24 for the shuttle bus contract at AK Steel. (Tr. 25–26, 37–38, 622, 625–626, 628; R. Exh. 3 (pp. 1, 15); see also Tr. 37, 40–41 (noting that the Union learned in March 2020, that Lakefront Lines might be going out of business, and received notice in July 2020, that Lakefront Lines would be ceasing operations), 294, 478, 524 (noting that the shuttle bus drivers learned in around late July that Lakefront Lines would be closing and that another company would be coming in to operate the AK Steel shuttle buses).)

In early August, Goebel contacted McGlothen to ask if she would stay on as lead driver if Respondent was awarded the AK Steel shuttle bus contract. McGlothen indicated that she would do so. (Tr. 627–628; see also R. Exh. 3 (p. 1) (showing that Goebel, in a handwritten note on a July 20 email from an AK Steel representative, identified McGlothen as a supervisor); Tr. 25–26 (discussing R. Exh. 3).)

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<sup>19</sup> Doucette testified that after Hubbard missed picking up a passenger, she (Doucette) and McGlothen sat in the parking lot for a week to observe drivers and determine whether they were running their routes correctly. (See Tr. 489–491, 508, 513–514.) I do not credit Doucette's testimony that Brandenburg and Hubbard did not run their routes properly on two occasions that week, as there is no documentation to support Doucette's observations, nor is there any documentation to show that Lakefront Lines took any disciplinary action based on McGlothen's and Doucette's observations.

Similarly, I do not credit McGlothen's testimony that she reviewed shuttle bus mileage and could determine from the mileage that Brandenburg and Hubbard were not running their full routes. No documentation of mileage was offered into the evidentiary record, nor was any testimony offered to explain the basis of McGlothen's assertion that, based solely on mileage, she could tell that Brandenburg and Hubbard (and not some other driver(s)) were not running their full routes. (See Tr. 419–420, 449–450.)

On August 13, AK Steel awarded the shuttle bus contract to Respondent. The next day, Respondent executed an agreement to acquire several assets from Lakefront Lines in exchange for Respondent assuming Lakefront Lines' obligations under a lease and sublease for properties owned by Goebel and unrelated to AK Steel. As part of the asset agreement, Lakefront Lines  
 5 agreed to lease to Respondent the nine shuttle buses that Lakefront Lines used for the AK Steel contract, with the shuttle bus lease to be effective from September 1 through October 31 (or, if earlier, the date that Respondent received the title for the shuttle buses).<sup>20</sup> (Tr. 19–23, 28–29, 623–625, 629–630, 649–650; R. Exhs. 3 (pp. 16–17), 4.)

10 *F. August 2020: Shuttle Bus Drivers Talk about the Prospect of Respondent Handling the AK Steel Shuttle Bus Contract*

1. Tucker says she may contact the “Labor Board” about vacation pay

15 In about early August, Tucker asked if she would receive vacation pay that she accrued with Lakefront Lines (since Lakefront Lines would be closing). McGlothen responded that she did not know and that Tucker would need to wait and see what happened. Tucker responded that she would have to call the “Labor Board” about the vacation pay issue. (Tr. 244–245, 518–519; see also Tr. 519, 540 (noting that Tucker often threatened to go to the Labor Board over issues in  
 20 the workplace).)<sup>21</sup>

2. McGlothen's statements to employees about Respondent's position on unions

25 Once it was clear that Respondent would be handling the AK Steel shuttle bus contract, in around mid-August Hubbard heard McGlothen say that she (McGlothen) would be able to do whatever she wanted to do once Respondent took over operations. In addition, in the same time period McGlothen:

- 30
- told Brandenburg and Hubbard (in separate telephone calls) that Respondent would be taking over for Lakefront Lines at the AK Steel facility but was nonunion;<sup>22</sup>
  - told Jane McKee (another shuttle bus driver) that Respondent did not have a union; and

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<sup>20</sup> Ultimately, T. Goebel Equipment ended up purchasing nine shuttle buses from Lakefront Lines on November 1. Of those nine buses, Lakefront Lines had previously used seven buses at the AK Steel facility; the remaining two buses came from a Lakefront Lines facility in Cleveland, Ohio. (Tr. 28–30.)

<sup>21</sup> I have credited Doucette's description of the content of this conversation. I found Tucker to be less reliable on this point because Tucker testified that the conversation occurred while she was at work on September 1 (the first day that Respondent began operating the shuttle buses), and the evidentiary record shows that Tucker did not work that day. (See FOF, Section II(I)(2), *infra*.)

I note that I give no weight to McGlothen's testimony that she does not remember Tucker “ever threaten to file a charge with the union Board.” That limited denial is outweighed by the testimony of two of Respondent's witnesses (Doucette and McKee) who confirmed that Tucker talked about contacting the Labor Board when workplace issues arose. (Compare Tr. 428–429 with Tr. 518–519, 540.)

<sup>22</sup> To the extent that McGlothen denied speaking to Hubbard about the union (see Tr. 426), I do not credit that testimony. McGlothen's general denial does not refute the specific testimony that Hubbard provided about McGlothen's remarks, and furthermore, the evidentiary record shows that McGlothen made similar remarks to multiple employees about Respondent being nonunion.

- told Doucette and Tucker that Goebel was not a union person (in response to a question asked about whether employees would still have to pay union dues)

(Tr. 173–174, 176, 296–297, 317, 478–479, 510, 548–549.)<sup>23</sup>

5

*G. August 2020: Brandenburg and Hubbard Swap Buses Over McGlothen's Objection*

10 In around mid-August, Brandenburg reported in the morning for her shift and drove her assigned (Yellow) route. The bus assigned to Brandenburg's route, however, was unusually difficult to steer and required the driver to grip the steering wheel to avoid having the wheel jerk out of the driver's hands. Due to this problem, when Brandenburg finished her route for the morning, she was experiencing severe back and neck pain.<sup>24</sup> (Tr. 156–159, 342.)

15 When the drivers returned to the facility to drive their routes in the afternoon, Brandenburg told Hubbard about her back and neck pain due to the poor steering on her bus. Hubbard, who also assigned one of the Yellow routes, offered to swap buses with Brandenburg (with each of them staying on their respective routes). Brandenburg agreed. McGlothen, however, later confronted Brandenburg and Hubbard and asserted that they were not permitted to change buses unless they also changed routes (Brandenburg's route required two laps, while  
20 Hubbard's required three). Brandenburg explained that she needed to trade buses with Hubbard because Brandenburg's originally assigned bus was causing her back and neck pain, prompting McGlothen to respond that she had a bad back also. Hubbard chimed in that she was fine with driving the bus with the steering problem, but McGlothen repeated that Hubbard needed to drive the bus that was on the paperwork. Brandenburg then called Robeson, who approved Hubbard  
25 and Brandenburg swapping buses under the circumstances. Upset by this development, McGlothen confronted Brandenburg about always getting her way with Robeson and with the union. McGlothen then got into her shuttle bus and sped off, spinning the bus wheels in the gravel as she left. (Tr. 157, 159–163, 281–283, 308, 340–341.)

30 The next day that Hubbard came to work, McGlothen told her to go into the office and look at McGlothen's desk. Hubbard complied and saw documents on McGlothen's desk that described McGlothen's medical conditions. McGlothen then told Hubbard that she (McGlothen) had medical conditions also and began describing them to Hubbard. Hubbard responded  
35 "Phyllis, I'm sorry that you have all of those problems, too, but I would have switched buses with you also." (Tr. 284–285.)<sup>25</sup>

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<sup>23</sup> The evidentiary record does not establish what led McGlothen to make these statements about Respondent's/Goebel's position on unions. During trial, Goebel and McGlothen denied speaking to each other (or Robeson) about the Union in August 2020. (Tr. 414, 628, 630–631, 635–636.)

<sup>24</sup> The evidentiary record does not establish precisely what caused Brandenburg's bus to be difficult to steer, but various witnesses suggested that the bus had a problem with one of its "kingpins," a shaft that connects the axle and spindle on a vehicle. Goebel agreed that a damaged or jammed (e.g., due to dirt or debris) kingpin or king pin bushing would affect the vehicle's steering. (Tr. 642, 647, 659, 663–664; see also R. Exh. 23.)

<sup>25</sup> McGlothen testified that she did not remember an incident related to Brandenburg and Hubbard swapping buses. (Tr. 452–453.) I have credited Hubbard's and Brandenburg's testimony on this point. Hubbard and Brandenburg corroborated each other about the incident, and no one asked Robeson to weigh in or dispute his role in approving the bus swap. In addition, Doucette described a similar incident

*H. Late August 2020: Respondent Prepares to Take Over the AK Steel Shuttle Bus Operations*

5 1. Employee application process

10 In late-August, Respondent asked McGlothen to provide job applications to the existing group of shuttle bus drivers who wished to seek employment as shuttle bus drivers for Respondent. Consistent with that request, McGlothen distributed the job applications to the drivers and later reminded some of the drivers to turn in their applications. (Tr. 174–175, 242, 247, 297, 362, 412–413, 478, 525, 630–631; GC Exh. 9 (August 31 text messages in which McGlothen reminded Hubbard to turn in her job application and Hubbard indicated that she would do so that evening).)

15 Brandenburg hand delivered her job application to Goebel on about August 27 or 28,  
while Hubbard turned her application in on August 31. Tucker, meanwhile, planned to hand  
deliver her job application to Respondent on September 1, when she believed that one of  
Respondent's representatives would be at the AK Steel facility to meet with employees. (Tr.  
174–175, 242, 297–298, 413, 631–634; see also Tr. 247–248 (noting that Tucker preferred to  
20 turn in her application in person instead of by fax because of the confidential information on the  
application).)

2. Goebel gets McGlothen's recommendation on which shuttle bus drivers to hire

25 On about August 31, Goebel met with McGlothen to collect the job applications from the drivers. Goebel also asked McGlothen if there were any current shuttle bus drivers who were troublemakers that she would not want Respondent to hire. McGlothen recommended against hiring Brandenburg, Hubbard and Tucker. McGlothen provided the following rationale for her recommendation to Goebel (both at the time she spoke to Goebel and during trial):

Brandenburg: a troublemaker who did not listen to McGlothen, would not come in on time, was a “no call no show,” and improperly wore shorts or holey jeans to work;

35            Hubbard:        did not drive her route correctly (e.g., by cutting her route short and leaving early), constantly complained if McGlothen had to switch her bus for any reason, and “liked to stir the pot” and “would say stuff to the other drivers to get them going” (such as saying that McGlothen assigned Hubbard a bus in poor condition because McGlothen was mad at her); and

Tucker:       made vulgar comments about other drivers to get a reaction.

Goebel asked McGlothen if she would still have enough drivers to cover shifts without Brandenburg, Hubbard and Tucker, and McGlothen said yes. Based solely on McGlothen's

(and perhaps the same one) in which McGlothen told Hubbard she could not swap buses, only to have Robeson approve the swap anyway. (See Tr. 484–485.)



recommendation and without reviewing any job applications or gathering any other information, Goebel decided not to offer employment to Brandenburg, Hubbard or Tucker. (Tr. 10–11, 27–28, 365–370, 413, 426, 633–635, 651–652; see also FOF, Section II(C)–(D) (describing the issues that arose in 2019, and 2020, between McGlothen and Brandenburg, Hubbard and Tucker); Tr. 588–589, 591 (noting that McGlothen also told Robeson that Respondent should not hire Brandenburg, Hubbard and Tucker because they were troublemakers that caused conflict with other drivers).)<sup>26</sup>

*I. September 1, 2020: Respondent Takes Over the AK Steel Shuttle Bus Operations*

1. Operations and terms and conditions of employment

On September 1, 2020, Respondent began providing shuttle bus services at the AK Steel facility. Respondent hired six shuttle bus drivers who were previously shuttle bus drivers for Lakefront Lines (McGlothen, Doucette, McKee and employees D.M., M.P. and G.W.), and hired B.D. as a new shuttle bus driver who was part of the Lakefront Lines bargaining unit as a charter bus driver. Respondent also retained Robeson as its general manager and McGlothen as lead driver. Respondent used seven (out of eight) of the shuttle buses that Lakefront Lines had been using at the AK Steel facility and did not make any changes to employee's terms and conditions of employment. Respondent did, however, select an outside contractor to perform shuttle bus maintenance (Lakefront Lines had an internal maintenance staff). (Tr. 23–24, 27–28, 30, 353–355, 363–364, 383–384, 388–389, 454–455, 594–595, 598, 600, 618–619, 636, 645; GC Exh. 12 (p. 1 (listing the seven shuttle bus drivers on Respondent's payroll from September 1–13, 2020, and indicating that McGlothen was still handling scheduling duties); R. Exhs. 9–10, 12 (schedule and payroll for early September 2020); see also R. Exh. 9 (pp. 3–5) (payroll sign in sheets noting McGlothen's role as lead driver); GC Exh. 8 (pp. 6–7) (disciplinary warnings that McGlothen issued while working for Respondent in February 2021).)

2. Respondent notifies Brandenburg, Hubbard and Tucker that they will not be hired

Robeson took on the task of notifying Brandenburg, Hubbard and Tucker that Respondent would not be hiring them. First, Robeson telephoned Tucker in the evening on August 31 because Lakefront Lines had scheduled Tucker to work the morning shift on September 1 and Robeson wanted to avoid having Tucker come to the facility unnecessarily.<sup>27</sup> Next, in the morning on September 1, Robeson called Brandenburg and Hubbard and advised them that Respondent would not be needing their services (Lakefront Lines had scheduled

<sup>26</sup> During trial, McGlothen provided a wide-ranging account of her concerns/problems with Brandenburg, Hubbard and Tucker in 2019, and 2020. (See Tr. 414–429.) The evidentiary record does not show that McGlothen communicated any concerns to Goebel beyond those identified in this section. However, to the extent that I found sufficient corroboration for the concerns that McGlothen identified, I have described them in Section II(C)–(D) of the Findings of Fact.

<sup>27</sup> I do not credit Tucker's testimony that she worked the morning shift on September 1 and was contacted by Robeson afterwards about not being hired by Respondent. (Tr. 242–245, 251.) Respondent presented various records that show that Tucker did not work on September 1, including clock-in records, payroll sign-in sheets, payroll records and an updated schedule showing that Respondent scheduled McGlothen, Doucette, McKee, G.W. and B.D. to work the morning shift on September 1. (See R. Exhs. 9 (pp. 1, 3, 7), 10, 12, 21; Tr. 257, 261, 430–431, 593–594.)

Brandenburg and Tucker to work the evening shift that day). Robeson did not provide an explanation for Respondent's decision. (Tr. 175–176, 300, 364–365, 591–593; see also GC Exh. 6 (Lakefront Lines schedule, including September 1); R. Exh. 7 (pp. 3–4) (Brandenburg text message to McGlothen in the morning on September 1 after learning Respondent would not be hiring her).)

*J. Early September 2020: The Union Contacts Respondent after Learning that Respondent has the AK Steel Shuttle Bus Contract*

On September 1–2, Vogt learned for the first time that Respondent had the AK Steel shuttle bus contract and had not hired Brandenburg, Hubbard or Tucker. Vogt also heard from employees that McGlothen had indicated that Respondent was nonunion. (Tr. 42–45, 61, 63–65; see also FOF, Section II(F)(2), *supra* (describing McGlothen's statements to employees about Respondent being nonunion).)

Next, on September 2, Vogt spoke with McGlothen by telephone (Vogt knew McGlothen from when they worked together to negotiate the collective-bargaining agreement with Lakefront Lines). McGlothen reported that things were uneasy among the shuttle bus drivers because Respondent did not hire the three people who were the most vocal for the union (Brandenburg, Hubbard and Tucker) and because Respondent had indicated that it would be nonunion. Vogt asked McGlothen whether the drivers might be willing to sign new union cards, to which McGlothen indicated that she could ask the drivers but would have to think about whether she would sign a union card. (Tr. 48–49; GC Exh. 15 (pp. 2–3) (text message exchange between Vogt and McGlothen on September 2).)<sup>28</sup>

On September 3, Vogt spoke with Goebel by telephone and asserted that Respondent's shuttle bus drivers were represented by the Union and that there was a collective-bargaining agreement in effect. Goebel replied that no one at AK Steel told him that the shuttle bus drivers were unionized when Respondent was preparing its contract bid and added that Respondent would not be unionized unless required to do so. Goebel also maintained that the Union should contact AK Steel about redoing the bid with it made clear that the shuttle bus drivers were covered by a collective-bargaining agreement. Vogt explained that the Union would have to take the next steps to being recognized as the representative of the employees in the bargaining unit. (Tr. 24, 35, 45–47, 637–638, 652, 656; see also R. Exh. 20 (showing that Vogt texted Goebel on September 1 and 3 to suggest that they talk about AK Steel); Tr. 79–80 (discussing R. Exh. 20).)<sup>29</sup>

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<sup>28</sup> McGlothen did not testify about this conversation with Vogt but did deny that Goebel or Robeson told her that the Union did not represent Respondent's shuttle bus drivers. (See Tr. 356–357.) I do not credit McGlothen's testimony to the extent that it may conflict with Vogt's description of his conversation with McGlothen on September 2. The evidentiary record shows that McGlothen made multiple statements in the August/September time period about Respondent being nonunion (see FOF, Section II(F)(2)), and Vogt's description of McGlothen's remarks is consistent with those facts.

<sup>29</sup> I give little weight to Goebel's testimony that he did not tell Vogt in this conversation that he refused to recognize the Union. (See Tr. 638.) Even if Goebel did not use those exact words, his message to Vogt was clear – Respondent was not going to recognize or bargain with the Union, and if the Union disagreed then the Union needed to contact AK Steel about rebidding the shuttle bus contract.

*K. September 2020: Respondent Continues to Hire Shuttle Bus Drivers*

Respondent continued to hire shuttle bus drivers after September 1. During that effort, McGlothen asked former driver Becky Hall (who retired in early August 2020) if she would be interested in working for Respondent. When Hall declined and asked why Respondent needed drivers, McGlothen explained that Respondent did not hire three Lakefront Lines drivers because they were pro-union.<sup>30</sup> (Tr. 202–203, 210, 214–215, 374–375, 453–454; see also Tr. 221–222 (Hall testimony indicating that this conversation with McGlothen took place around Labor Day, which was September 7, 2020), 453–454 (McGlothen testimony indicating that she spoke to Hall after September 1 about the possibility of working for Respondent).)

By late September 2020, Respondent hired three additional shuttle bus drivers to work at the AK Steel facility (employees J.C., K.M. and J.S.). Employee J.C. was part of the Lakefront Lines bargaining unit as a charter bus driver. (Tr. 376–377, 595–597, 599–600, 636–637; GC Exh. 12 (p. 2); see also Tr. 596–597 (noting that Respondent also hired additional drivers later in Fall 2020); GC Exh. 12 (p. 8 (showing new employees L.B., E.F. and K.R. in training starting on about December 7, 2020).)<sup>31</sup>

*L. November 23, 2020: The Union Again Asks Respondent for Recognition as Bargaining Representative*

On November 23, 2020, Vogt emailed Goebel to demand that Respondent recognize the Union as the representative of employees in the bargaining unit. Vogt stated as follows in his email:

Good morning Tom:

This is regarding the demand for recognition as the Union representative of the employees of an Employer which is the successor to Lakefront Lines.

As you are no doubt aware, Local 322 Eastern States Joint Board was the Union representing the drivers who, as employees of Lakefront Lines, transported AK Steel employees around AK Steel facilities and, to the extent required, to locations offsite. When Lakefront Lines closed its facility and [Respondent] succeeded to the work, other than those employees who were summarily terminated for their support for Local 322, [Respondent] hired the same drivers (most or all of whom were former Lakefront Lines

<sup>30</sup> McGlothen denied telling Hall that Respondent “had to get rid of three people.” (Tr. 375.) I do not credit that limited denial to the extent that it conflicts with Hall’s testimony. As noted elsewhere, McGlothen told multiple people in August/September that Respondent was nonunion, and Hall’s testimony is consistent with that evidence.

<sup>31</sup> In connection with Respondent’s hiring efforts, the General Counsel presented evidence of a job announcement that McGlothen made online to request applicants for shuttle bus driver positions. I have not given any weight to that evidence because the General Counsel did not establish with sufficient reliability when McGlothen posted the job announcement (i.e., it is not clear whether McGlothen posted the announcement after September 1, 2020, or much earlier in the year). (See GC Exh. 11; Tr. 51, 320–322, 375–376.)

drivers and members of Local 322 [except] those that [were] terminated for the Union activity so as to instill fear in the remaining employees).

The drivers do the same work they did for Lakefront Lines, at the same facility, using the same vehicles, transporting the same workers who work for the same company as the Local 322 drivers did previously. It is clear to me [that Respondent] is the successor to Lakefront Lines. As such, I hereby demand that you recognize Local 322 Eastern States Joint Board, as the collective bargaining representative of the drivers working for [Respondent] as the successor of Lakefront Lines.

(GC Exh. 4.) Respondent did not reply to Vogt's recognition demand. (Tr. 25, 56–58.)

*M. January/February 2021: Respondent Plans to Terminate its Shuttle Bus Contract with AK Steel and Does Not Respond to the Union's Requests for Effects Bargaining*

On January 11, 2021, Respondent notified AK Steel that Respondent planned to stop providing shuttle bus services at the AK Steel facility effective February 28, 2021. AK Steel objected to Respondent's plan to terminate the shuttle bus contract but indicated that it would be open to Respondent finding another qualified provider to operate the shuttle buses as long as there would be no increase in cost. Respondent eventually arranged for an entity named Ultimate Tours to take over the AK Steel shuttle bus contract. (R. Exhs. 13–15; Tr. 638–641, 648–649, 656, 658–659, 661.)

Upon learning of Respondent's plans to end its work under the AK Steel shuttle bus contract, Vogt emailed Goebel on January 15, 2021, to request bargaining over the effects of that decision. Vogt stated as follows in his email:

Good morning Tom. Local 322 has been made aware of your intent to close down shuttle operations at AK Steel. If these are your intentions then we need to negotiate the closing effects. These employees are still part of a CBA and as a successor to the contract let me know when you want to discuss. Thank you in advance for your time.

(GC Exh. 4.) Vogt reiterated the Union's request for effects bargaining in a February 16, 2021 email to Goebel and one of Respondent's attorneys. Respondent did not reply to either of the requests for effects bargaining. (GC Exh. 4; Tr. 56–57.)

## DISCUSSION AND ANALYSIS

### *A. Witness Credibility*

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably

be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 860. My credibility findings are set forth above in the findings of fact for this decision.

*B. Was Respondent a Successor to Lakefront Lines and Therefore Obligated to Bargain with the Union?*

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about September 3, 2020, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit (obligations that Respondent had as the successor employer to Lakefront Lines).

2. Applicable legal standard

The Board's successorship doctrine is founded on the premise that, where a bargaining representative has been selected by employees, a continuing obligation to deal with that representative is not subject to defeasance solely on grounds that ownership of the employing entity has changed. Consistent with this view, when a new employer continues its predecessor's business in substantially unchanged form and hires employees of the predecessor as a majority of its work force, the new employer is a successor and is obligated to bargain with the union that represented those employees when they were employed by the predecessor. *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5 (2016). The essence of successorship is not premised on an identical re-creation of the predecessor's customers and business, but rather, on the new employer's conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor in order to take advantage of the trained worked force of its predecessor. *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 2 (2017).

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972), the Supreme Court held that a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. *Id.* at 295. The Court recognized, however, that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.” *Id.* at 294–295.

An employer is a successor employer obligated to recognize and bargain with the union representing the predecessor's employees when (1) there is a substantial continuity of operations, and (2) a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees. *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 2.

To determine whether, in the totality of the circumstances, there is substantial continuity between the predecessor and alleged successor, the Board considers the following factors:

whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

*Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); see also *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 2. In conducting the analysis, the Board keeps in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 43. The Board determines whether the workforce majority requirement has been met based on the time that the successor has hired a substantial and representative complement of its employees. See *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 2.

### 3. Analysis

The evidentiary record establishes that Respondent is the successor employer to Lakefront Lines. At the beginning of trial, Respondent stipulated that the Union was the collective-bargaining representative for the bargaining unit from September 1, 2020 (the date that Respondent began operating shuttle buses at the AK Steel facility) until about February 28, 2021, when Respondent stopped performing work under the AK Steel contract. The evidence adduced at trial is fully consistent with that stipulation, as there is no dispute that on September 1, 2020, Respondent began operating the shuttle bus business at AK Steel in substantially unchanged form and with a majority of its full complement of shuttle bus drivers being union-represented former employees of Lakefront Lines in an appropriate bargaining unit. (See FOF, Section II(A)(1), (I)(1); Tr. 10–11.)

As the successor employer to Lakefront Lines, Respondent had an obligation to recognize and bargain with the Union.<sup>32</sup> See *Allways East Transportation, Inc.*, 365 NLRB No. 71, slip op. at 5. Respondent, however, failed and refused to do so when the Union requested such recognition on September 3, 2020, and thereby violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.<sup>33</sup> (FOF, Section II(J); see also FOF, Section II(L)–(M) (noting that the Union also asked Respondent for recognition and bargaining in November 2020 and January 2021, but did not receive a response).)

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<sup>32</sup> In its posttrial brief, the General Counsel suggested that Respondent was a perfectly clear successor employer and was obligated to bargain with the Union over the initial terms and conditions of employment. (See GC Posttrial Br. at 14–15.) I decline to rule on that argument because the General Counsel did not allege in the complaint that Respondent was a perfectly clear successor, and because any finding that Respondent was a perfectly clear successor (as opposed to an ordinary successor) would not affect the remedy in this case since Respondent did not set new initial terms and conditions of employment when it began operations on September 1, 2020. (See FOF, Section II(I)(1); GC Exh. 1(j) (par. 2 (alleging that Respondent is a successor to Lakefront Lines).)

<sup>33</sup> Respondent did not present any argument in its posttrial brief regarding this aspect of the complaint.

*C. Does McGlothen Qualify as a Statutory Supervisor?*

As a preliminary matter relating to the Section 8(a)(3), (4) and (1) allegations in this case, the parties dispute whether McGlothen was a statutory supervisor due to her responsibilities as lead driver for Lakefront Lines and Respondent. Individuals are statutory supervisors if: (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act (i.e., the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances of other employees); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement. The party asserting supervisory status has the burden of establishing such status by a preponderance of the evidence. Conclusory evidence does not satisfy that burden. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888–889 (2014); see also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006).<sup>34</sup>

The evidentiary record establishes that McGlothen served as a statutory supervisor for both Lakefront Lines and Respondent. As lead driver for both entities, McGlothen had the authority to discipline shuttle bus drivers, assign drivers work shifts and shuttle bus routes, and direct shuttle bus drivers in their work. McGlothen used her independent judgment when exercising that authority, as: (a) there was little evidence of any policies or instructions that dictated how McGlothen should make decisions; (b) McGlothen decided when to discipline employees and only provided notice to Robeson afterwards; and (c) Robeson relied on McGlothen to handle scheduling and direct the drivers on a day to day basis. To be sure, Robeson intervened occasionally to address employee complaints about scheduling or other matters, but the fact remains that Robeson generally left scheduling, assignments, discipline and driver direction in McGlothen’s hands. (See FOF, Section II(A)(2), (B), (D), I(1).) Accordingly, I find that the General Counsel met its burden of providing that McGlothen was a statutory supervisor in the relevant time period (2019–2021).<sup>35</sup>

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<sup>34</sup> The Board has recognized that certain “secondary indicia” may support a finding of supervisory status if the evidentiary record shows that the alleged supervisor possesses at least one of the primary indicia of supervisory status set forth in Section 2(11) of the Act. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Secondary indicia of supervisory status include, but are not limited to, the individual’s: designation as a supervisor; attendance at supervisory meetings; responsibility for a shift or phase of the employer’s operation; authority to grant time off to other employees; responsibility for inspecting the work of others; responsibility for reporting rule infractions; receipt of privileges exclusive to members of management; and compensation at a rate higher than the employees supervised. The ratio of supervisors to employees is also a secondary indicator of supervisory status. See *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *Flexi-Van Service Center*, 228 NLRB 956, 960 (1977).

<sup>35</sup> Alternatively, I find that McGlothen was Respondent’s agent within the meaning of Section 2(13) of the Act, particularly with regard to Respondent’s decisions to not hire Brandenburg, Hubbard and Tucker. Respondent admitted that McGlothen had direct input into Respondent’s decisions about which shuttle bus drivers to hire (indeed, Respondent made its hiring decisions solely based on McGlothen’s

*D. Did Respondent Violate the Act by Refusing to Hire Brandenburg, Hubbard or Tucker?*

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, on about September 1, 2020, refusing to hire Marsha Brandenburg, Angela Hubbard and Denise Tucker because they formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

The General Counsel also alleges that Respondent violated Section 8(a)(4) and (1) of the Act by, on about September 1, 2020, refusing to hire Denise Tucker because she threatened to file a charge with the National Labor Relations Board.

2. Applicable legal standard

Normally, to establish a discriminatory refusal to hire, the General Counsel must show (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered to such requirements, or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once those elements are established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. See *FES*, 331 NLRB 9, 12 (2000).

The Board has explained, however, that the refusal to hire legal standard set forth in *FES* does not apply where a successor employer does not retain employees of the predecessor because (among other reasons) in successorship cases the predecessor's employees presumptively meet the successor's qualifications for hire and it is clear that the successor employer must fill vacant positions to start up its business. Because of those differences, the Board has found that a refusal to hire in a successorship context is analogous to a discriminatory discharge. *Planned Building Services*, 347 NLRB 670, 673 (2006), overruled on other grounds, *Pressroom Cleaners, Inc.*, 361 NLRB 643 (2014).

Accordingly, when the General Counsel alleges a refusal to hire by a successor employer, the following factors are among those that would establish that the new owner violated Section 8(a)(3) by refusing to hire the employees of the predecessor:

[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct

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recommendation, see FOF, Section II(H)(2)), and thus any animus that affected McGlothen's recommendation is imputed to Respondent. Cf. *Bruce Packing Co.*, 357 NLRB 1084, 1086 (2011) (noting that "the Board's case law is clear that the antiunion motivation of a supervisor will be imputed to the decision-making official, where the supervisor has direct input into the decision"), enfd. in pertinent part, 795 F.3d 18 (D.C. Cir. 2015).



evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

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*Planned Building Services*, 347 NLRB at 673–674.

Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. In establishing its affirmative defense, the employer is free to show, for example, that it did not hire particular employees because they were not qualified for the available jobs, and that it would not have hired them for that reason even in the absence of the unlawful considerations. Similarly, the employer is free to show that it had fewer unit jobs than there were unit employees of the predecessor. *Id.* at 674; cf. *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 15 (2018) (explaining that to show that an employer's adverse that an adverse employment action violates Section 8(a)(1) of the Act, the General Counsel must demonstrate that: the employee engaged in activity that is "concerted" within the meaning of Section 7 of the Act; the employer knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the employer's adverse action against the employee was motivated by the employee's protected concerted activity.)

### 3. Analysis – Marsha Brandenburg

The General Counsel made an initial showing that Brandenburg's union or other protected concerted activities were a motivating factor in Respondent's decision not to hire Brandenburg. As set forth in the Findings of Fact, Brandenburg engaged in union and protected concerted activity in both 2019, and 2020. Most of Brandenburg's union activities related to seniority, with Brandenburg (sometimes assisted by Vogt) maintaining that Lakefront Lines should adhere to its past practice of following seniority when filling out the schedule, granting time off, or calling drivers to work an open shift. Some of Brandenburg's efforts were successful, such as in June 2020, when Lakefront Lines agreed to pay Brandenburg for a shift that McGlothen filled without following seniority, and in July 2020, when Brandenburg received time off during the July 4th weekend after her vacation request was initially rejected. Brandenburg also engaged in protected concerted activity when, in about August 2020, she and Hubbard urged McGlothen to allow them to swap buses (so Brandenburg could avoid driving a bus with poor steering that was causing her back pain) and then obtained approval for the swap from Robeson when McGlothen refused. McGlothen repeatedly voiced her frustration about Brandenburg's efforts, as (among other statements) McGlothen complained that she was tired of Brandenburg always "getting her way" with the Union. When Respondent asked McGlothen which shuttle bus drivers it should not hire, McGlothen acted on that frustration by identifying Brandenburg as a troublemaker who should not be offered employment. (See FOF, Section II(C)(1), (D)(2)–(4), (G), (H)(2).)

As its affirmative defense, Respondent maintains that it would not have hired Brandenburg even in the absence of her union and protected concerted activities because Brandenburg was a poor employee who: had an extensive disciplinary record; had problems with

attendance; violated the dress code; did not drive her route correctly; and threatened Doucette. (See R. Posttrial Br. at 35–36.) Respondent’s argument, however, has several shortcomings. First, the evidentiary record does not show that McGlothen communicated any concerns to Goebel about Brandenburg not driving her route correctly or about making threats to Doucette. (See FOF, Section II(H)(2) (noting that McGlothen told Goebel that Brandenburg was a troublemaker who did not listen to McGlothen, would not come in on time, was a “no call no show,” and improperly wore shorts or holey jeans to work).) As a result, Respondent cannot now assert that those issues led it to decide against hiring Brandenburg.

Second, McGlothen (and Lakefront Lines) tolerated the alleged misconduct that Respondent now points to as the basis for McGlothen’s recommendation against hiring Brandenburg. While McGlothen spoke to Brandenburg about not wearing shorts or holey jeans to work, there is no evidence that McGlothen took any further action or issued any discipline based on Brandenburg’s attire. McGlothen took the same approach when she believed (in July 2020) that Brandenburg was not driving her route correctly – McGlothen texted Brandenburg about the issue but took no further action. As for attendance and insubordination, McGlothen issued three disciplinary warnings to Brandenburg in the summer of 2019 (two warnings for attendance, and one warning related to both attendance and insubordination), but then took no further disciplinary action. And, to the extent that McGlothen was aware that Doucette believed Brandenburg had threatened her in 2019, McGlothen took no action to address it. (See FOF, Section II(C)(1), (D)(6).) In short, given McGlothen’s history of tolerating these issues, Respondent’s attempt to elevate them as reasons for not hiring Brandenburg falls flat, as does Respondent’s affirmative defense.<sup>36</sup>

Finally, I note that McGlothen stated in August 2020, that Respondent was nonunion. Similarly, in September 2020, McGlothen stated that Respondent did not hire Brandenburg, Hubbard and Tucker because they supported the union. (See FOF, Section II(F)(2), (J).) Based on that evidence, along with the General Counsel’s initial showing of discrimination and Respondent’s failure to prove its affirmative defense, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it refused to hire Brandenburg on September 1, 2020, because of her union and protected concerted activities.

#### 4. Analysis – Angela Hubbard

The General Counsel also made an initial showing that Hubbard’s union and protected concerted activities were a motivating factor in Respondent’s decision not to hire Hubbard. Hubbard was a union member, but the evidentiary record does not show that she was particularly active in communicating with the Union or Lakefront Lines about working conditions except for in July 2020, when Hubbard contacted Vogt and Robeson about a disagreement with McGlothen concerning whether Hubbard was driving her route correctly. For whatever reason, however, McGlothen viewed Hubbard as someone who liked to “stir the pot” with other drivers by saying things to “get them going” (such as comments that McGlothen assigned Hubbard a bus in poor condition because McGlothen was mad at Hubbard). This dynamic came to a head in August 2020, when Hubbard and Brandenburg obtained approval from Robeson to swap buses (over

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<sup>36</sup> In making this finding, I do not condone any threatening remarks that Brandenburg may have made to Doucette. I only find that Respondent failed to prove its affirmative defense based on that issue.

McGlothen's objection) because Brandenburg's bus had poor steering that was causing her back pain. McGlothen viewed this incident as another example of Brandenburg getting her way with the Union, and I infer that McGlothen was equally unhappy with Hubbard for siding with Brandenburg in the dispute. Indeed, the day after the bus swapping incident, McGlothen showed  
 5 Hubbard her (McGlothen's) medical records to make the point that McGlothen had physical ailments but didn't complain about driving any of the shuttle buses. And, when Respondent asked McGlothen who to avoid hiring, McGlothen identified Hubbard as one of three troublemakers who should not be offered employment. (See FOF, Section II(C)(2), (D)(7), (G), (H)(2).)

Respondent contends, as its affirmative defense, that it would not have hired Hubbard even in the absence of her union and protected concerted activities because Hubbard: swapped buses whenever she wanted; "stirred the pot" with other drivers at work; and skipped stops on her bus route and left passengers stranded. (R. Posttrial Br. at 36.) All of those allegations miss  
 15 the mark. First, Lakefront Lines did not discipline Hubbard for any of this alleged misconduct (Hubbard had a clean disciplinary record). Thus, if Hubbard swapped buses as alleged, Lakefront Lines and McGlothen tolerated that practice (including the August 2020 bus swapping incident, which Robeson approved over McGlothen's objection). Similarly, when McGlothen told Hubbard (in July 2020) that she missed picking up a passenger, McGlothen took no  
 20 disciplinary action and I did not find any credible evidence that the problem continued. (See FOF, Section II(C)(2), (D)(7), (G).)

Second, in faulting Hubbard for stirring the pot with other drivers at work, I find that Respondent effectively faults Hubbard for engaging in protected concerted activities such as  
 25 speaking with other shuttle bus drivers about working conditions (e.g., scheduling, assignments, shuttle bus conditions). Such protected activities do not qualify as misconduct that would lawfully justify Respondent's decision to not hire Hubbard.

Finally, as previously noted, McGlothen stated in August 2020, that Respondent was  
 30 nonunion, and stated in September 2020, that Respondent did not hire Brandenburg, Hubbard and Tucker because they supported the union. (See FOF, Section II(F)(2), (J).) Based on that evidence, along with the General Counsel's initial showing of discrimination and Respondent's failure to prove its affirmative defense, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it refused to hire Hubbard on September 1, 2020, because of her union and  
 35 protected concerted activities.<sup>37</sup>

## 5. Analysis – Denise Tucker

Last, I find that the General Counsel made an initial showing that Tucker's union and  
 40 protected concerted activities were a motivating factor in Respondent's decision not to hire Tucker. The evidentiary record shows that Tucker frequently stated to McGlothen and other

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<sup>37</sup> Although Hubbard may not have engaged in union activities extensively, the evidentiary record shows that McGlothen and Respondent believed Hubbard was a union supporter. Accordingly, I have found that Respondent discriminated against Hubbard both under Section 8(a)(1) (for Hubbard's protected concerted activities) and Section 8(a)(3) (for Hubbard's union activities as Respondent perceived them).

employees that she (Tucker) would have to go to the “Labor Board” about issues in the workplace, such as whether Lakefront Lines would pay Tucker for vacation time that Tucker believed she had accrued.<sup>38</sup> While I did not find that McGlothen reacted to Tucker’s Labor Board comments when Tucker made them, McGlothen did ultimately identify Tucker (alongside  
 5 Brandenburg and Hubbard) as a troublemaker who Respondent should not hire. Respondent accepted McGlothen’s recommendation and did not hire Tucker. (See FOF, Section II(C)(3), (F)(1), (H)(2), (J)–(K).)

As its affirmative defense, Respondent maintains that it would not have hired Tucker  
 10 even absent her union and protected concerted activities because Tucker had a demonstrated inability to wake up and report to work on time (unless called by phone by McGlothen or Morgerson), and because Tucker made inappropriate vulgar comments at work. (R. Posttrial Br. at 36.) We can set aside the first proffered rationale quickly; McGlothen did not identify  
 15 Tucker’s need for wake-up calls as the basis for her recommendation that Respondent not hire Tucker, so Respondent cannot now rely on that rationale. (See FOF, Section II(H)(2); see also FOF, Section II(C)(3) (noting that Lakefront Lines never took disciplinary action against Tucker).)

The second proffered rationale, that Respondent did not hire Tucker because of her  
 20 inappropriate vulgar comments to coworkers at work, requires more discussion. The evidentiary record shows that Tucker occasionally made sexually inappropriate comments at work, at least one of which was in McGlothen’s presence (Tucker’s comment that a coworker had a pretty face and that Tucker had something the coworker could put her tongue on). Lakefront Lines never disciplined Tucker for that remark or anything similar, and the evidentiary record also shows that  
 25 other individuals onsite (shuttle bus drivers, AK Steel employees) likewise made sexually inappropriate comments on occasion. (See FOF, Section II(C)(3).) There is also no evidence in the record about Lakefront Lines’ or Respondent’s policies about sexual harassment, nor is there evidence that Lakefront Lines or Respondent ever took disciplinary action against another shuttle  
 30 bus driver for conduct similar to Tucker’s under such a policy. Due to these evidentiary shortcomings, Respondent’s affirmative defense falls short because I cannot conclude (without speculation) that Respondent would not have hired Tucker because of her inappropriate comments in the workplace.<sup>39</sup>

I also reiterate that McGlothen stated in August 2020, that Respondent was nonunion,  
 35 and stated in September 2020, that Respondent did not hire Brandenburg, Hubbard and Tucker because they supported the union. Those statements, along with the General Counsel’s initial showing of discrimination and Respondent’s failure to prove its affirmative defense, establish that Respondent violated Section 8(a)(3) and (1) of the Act when it refused to hire Tucker on  
 40 September 1, 2020, because of her union and protected concerted activities.

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<sup>38</sup> I do not find that Tucker engaged in “concerted” activity when she disagreed with McGlothen about whether shuttle bus drivers should be notified that a driver was diagnosed with COVID-19. While the topic certainly might have been of interest to other drivers, there is no evidence that Tucker communicated with other drivers about the issue. (See FOF, Section II(D)(5).)

<sup>39</sup> In making this finding, I do not condone any sexually inappropriate remarks that Tucker (or other individuals at the AK Steel facility) may have made in the workplace. I only find that Respondent failed to prove its affirmative defense based on that issue.

I recommend dismissal of the allegation that Respondent violated Section 8(a)(4) of the Act by refusing to hire Tucker because she threatened to file a charge with the NLRB. The General Counsel did not show that Respondent acted with animus based on any actual Board activities that Tucker engaged in on or before September 1, 2020. Instead, the General Counsel only demonstrated animus towards Tucker's union activities, including Tucker's saber-rattling about going to the "Labor Board" about working conditions that she took issue with. Given that missing element of proof (animus towards actual Board activities), the General Counsel failed to make the initial showing of discrimination based on Tucker's Board activities that is required to prove a Section 8(a)(4) violation. See *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 2 (2021) (finding no violation of Section 8(a)(4) due to the General Counsel's failure to make an initial showing of discrimination based on the employee's Board activities).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on about September 1, 2020, refusing to hire Marsha Brandenburg, Angela Hubbard and Denise Tucker because they engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By, since about September 3, 2020, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices stated in conclusions of law 3–4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully refused to hire Marsha Brandenburg, Angela Hubbard and Denise Tucker, must offer them employment in their former positions or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them (and discharging, if necessary, any employees hired in their place). Respondent must also make Brandenburg, Hubbard and Tucker whole for any loss of earnings and other benefits. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010); see also *Planned Building Services*, 347 NLRB at 674–675, 678–679 (applying this remedy in a successor employer refusal to hire context). Respondent shall also be required to expunge from

its files any references to its unlawful decisions to refuse to hire Brandenburg, Hubbard and Tucker, and within 3 days of thereafter shall notify them that this has been done and that the unlawful decisions will not be used against them in any way.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate Brandenburg, Hubbard and Tucker for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016) and *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 9: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>40</sup>

#### ORDER

Respondent, Barons Bus, Inc., Middletown, Ohio, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to hire employees of its predecessor, Lakefront Lines, because of their union and protected concerted activities.

(b) Refusing to recognize and bargain with the Eastern States Joint Board, Local 322, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

All full-time, regular part-time, and casual drivers, and all full-time and regular part-time operators, mechanics and cleaners employed by Respondent at the AK Steel facility located in Middletown, Ohio; excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

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<sup>40</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this order, offer employment to Marsha Brandenburg, Angela Hubbard and Denise Tucker in positions in which they previously worked for Lakefront Lines at the AK Steel facility or, if such positions no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place.

(b) Make Brandenburg, Hubbard and Tucker whole for any and all loss of earnings and other benefits incurred as a result of Respondent's unlawful refusal to hire them, with interest, as provided for in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful decisions to refuse to hire Brandenburg, Hubbard and Tucker and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

(d) Compensate Brandenburg, Hubbard and Tucker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s), and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(e) Recognize and bargain collectively with the Eastern States Joint Board, Local 322, AFL-CIO, as the exclusive collective-bargaining representative of Respondent's employees at the AK Steel facility in the following appropriate bargaining unit:

All full-time, regular part-time, and casual drivers, and all full-time and regular part-time operators, mechanics and cleaners employed by Respondent at the AK Steel facility located in Middletown, Ohio; excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Middletown, Ohio, a copy of the attached notice marked "Appendix."<sup>41</sup> Copies of the notice, on forms provided by

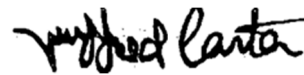
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<sup>41</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic

the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 26, 2021



Geoffrey Carter  
Administrative Law Judge

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distribution of the notice if Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire employees of our predecessor, Lakefront Lines, because of their union and protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the Eastern States Joint Board, Local 322, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

All full-time, regular part-time, and casual drivers, and all full-time and regular part-time operators, mechanics and cleaners employed by Barons Bus, Inc. at the AK Steel facility located in Middletown, Ohio; excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employment to Marsha Brandenburg, Angela Hubbard and Denise Tucker in positions in which they previously worked for Lakefront Lines at the AK Steel facility or, if such positions no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place.

WE WILL make Brandenburg, Hubbard and Tucker whole for any and all loss of earnings and other benefits incurred as a result of our unlawful refusal to hire them.

WE WILL remove from our files any references to the unlawful decisions to refuse to hire Brandenburg, Hubbard and Tucker and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

WE WILL compensate Brandenburg, Hubbard and Tucker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s), and a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL recognize and bargain collectively with the Eastern States Joint Board, Local 322, AFL-CIO, as the exclusive collective-bargaining representative of Respondent's employees at the AK Steel facility in the following appropriate bargaining unit:

All full-time, regular part-time, and casual drivers, and all full-time and regular part-time operators, mechanics and cleaners employed by Respondent at the AK Steel facility located in Middletown, Ohio; excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act.

BARONS BUS, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov)

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271  
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/09-CA-266622](http://www.nlrb.gov/case/09-CA-266622) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND  
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS  
CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE  
REGIONAL OFFICE'S COMPLIANCE OFFICER (513) 684-3733.